In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-242

WILLARD M. NOBLE and ETTA M. NOBLE,
Cross-Petitioners,

vs.

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY, an individual; WALTER P. JONES, an individual; C. K. McCLATCHY, an individual; BYRON CONKLIN, an individual; CARLO BUA, an individual,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
50 California Street, Suite 955,
San Francisco, California 94111,
Telephone: (415) 981-4938,
Attorneys for Cross-Petitioners.

PERRAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

Codes

Statutes

Other Authorities

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No.

WILLARD M. NOBLE and ETTA M. NOBLE,
Cross-Petitioners,

vs.

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY, an individual; WALTER P. JONES, an individual; C. K. McCLATCHY, an individual; BYRON CONKLIN, an individual; CARLO BUA, an individual,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Cross-petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 14, 1975.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 533 F.2d 1081. It appears as Appendix A to the Petition for Writ of Certiorari filed by petitioners in *McClatchy Newspapers, et al v. Willard M. Noble, et al.*, No. 76-86 in the Supreme Court of the United States (October Term, 1976). No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 14, 1975. A timely petition for rehearing filed by cross-petitioners herein was denied May 20, 1976. 533 F.2d 1081. This cross-petition for certiorari was filed within 90 days of May 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

This cross-petition involves a distribution system which permits the distributors to transfer and sell their businesses to another party for valuable consideration so long as the distributors are in good standing and their distribution agreements have not been terminated. However, if the manufacturer terminates the distribution agreement, with or without cause, the right to sell the business is lost and the dis-

tributor forfeits his equity interest and good will in his business. The questions presented here are:

1. Does a distributor suffer damages when he is prevented from selling his business under a sale of business restriction which has been found by the jury to be an unreasonable restraint of interstate trade and commerce under Section 1 of the Sherman Act, 15 U.S.C. §1, based upon a rule of reason analysis?

2. Should the judgment of the District Court in favor of cross-petitioners herein for $63,333.04 be reinstated by this Court against cross-respondents based upon the verdict of the jury, which was upheld by the District Court, that said sale of business restriction constituted an unreasonable restraint of interstate trade and commerce under Section 1 of the Sherman Act, 15 U.S.C. §1, and injured cross-petitioners as a result thereof?

3. Did the District Court abuse its discretion when it denied cross-petitioners' request to provide permanent equitable relief under Section 16 of the Clayton Act, 15 U.S.C. §26 prohibiting the cross-respondents from continuing to maintain this unreasonable restraint of trade?

STATUTES INVOLVED

SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. § 15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without re-

spect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323 §4, 38 Stat. 731; 15 U.S. Code, Sec. 15.

SECTION 16 OF THE CLAYTON ACT, 15 U.S.C. § 26

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323 §16, 38 Stat. 737; 15 U.S. Code, Sec. 26.

SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; December 21, 1974, Public Law 93-528, Sec. 3, 88 Stat. 1708; December 12, 1975, Public Law 94-145 (Antitrust Procedures and Penalties Act), 89 Stat. 801; 15 U.S. Code, Sec. 1.

STATEMENT OF THE CASE[1]

Defendant McClatchy Newspapers is the publisher of the dominant newspaper in the Sacramento, California metropolitan area—The Sacramento Bee. (Plts. Ex. 46F, RT 659). Like most newspaper publishers

---

[1]Cross-petitioners were the plaintiffs in the District Court and will hereinafter be referred to as plaintiffs. Cross-respondents were the defendants in the District Court and will hereinafter be referred to as defendants. RT refers to the Reporter's Transcript of the trial proceedings; CT refers to the Clerk's Transcript on appeal to the United States Court of Appeals; and Plts. Ex. refers to plaintiffs' exhibit admitted in evidence at the trial.

throughout the United States McClatchy Newspapers distributes The Sacramento Bee through independent contractors and not employees. The reason for this was explained by plaintiffs' expert on newspaper distribution, Paul Rothman, who had 55 years' experience in the newspaper business:

> "A. Well, a dealer works seven days a week, because *it's his business.* His wife usually takes care of his books. If he has a couple of boys they carry a paper route. If it was an employee setup, they would be working five days a week, forty hours a week, and you would have to have one and a third man for each dealership plus the fact that you would have to have a relief man for it, plus the fact that anytime that they worked beyond that forty hours, and this dealership is practically a twenty-four hour affair, in case of an emergency, why, you would have to pay all that overtime, plus the fact that you would have to supply trucks, vehicles of all kinds, where the dealership, the dealer takes care of his own transportation, plus the fact that you would have to buy or print all your various forms which the dealer either pays for now or buys it himself." (RT 1562). (Emphasis Added).

Distribution of The Sacramento Bee throughout northern California and Nevada is accomplished pursuant to written contracts with approximately 1,700 minor city carriers, 150 to 200 minor country carriers, 200 country adult distributors and 9 city adult newsstand distributors. As set forth in the city carriers' contracts, the country carriers' contracts, the country distributors' contracts and the city newsstand distributors' contracts, the entire distribution of The Sacramento Bee is laden with virtually all the recognized trade restraints—from resale price fixing,[2] customer restrictions,[3] territorial restrictions,[4] exclusive dealing,[5] to restraints against alienation.[6]

Mr. Paul Rothman testified that the above restraints were common practice in the newspaper industry all over the United States. (RT 1596-98). Defendants' counsel argued to the jury that the universality of these restraints by publishers throughout the country means "there is no great sinister brooding in Sacramento McClatchy Newspapers [sic] that has a lot of crazy and supposedly illegal contracts." (RT 2251).

The city newsstand distributor contracts between McClatchy Newspapers and its 9 adult city newsstand distributors permitted them to sell and transfer their distributorships to a third party for valuable consideration provided they gave McClatchy Newspapers sixty days' advance notice and obtained its consent to the transfer. McClatchy Newspapers agreed that it would not withhold its consent unreasonably. (Plts. Ex. 7, RT 140). Pursuant to this provision city newsstand distributor Gallagher sold Sacramento Bee City

---

[2]Para. 2 of Plts. Exs. 21, 22, RT 129; Para. 2 of Plts. Exs. 24, 25, RT 129-30; Para. 7 of Plts. Exs. 27, 28, RT 132, 137.

[3]Para. 6 of Plts. Exs. 21, 24, RT 129.

[4]Para. 7 of Plts. Exs. 21, 24, RT 129; Para. 6 of Plts. Exs. 22, 25, RT 129-30.

[5]Para. 16 of Plts. Exs. 21, 24, RT 129; Para. 15 of Plts. Exs. 22, 25, RT 129-30; Para. 7 of Plts. Exs. 27, 28, RT 132, 137; Para. 6 of Plts. Exs. 1, 6, RT 137, 139; Para. 4 of Plts. Ex. 7, RT 140.

[6]Para. 5 of Plts. Exs. 21, 22, 24, 25, RT 129-30; Para. 5 of Plts. Exs. 27, 28, RT 132, 137; Para. 10 of Plts. Exs. 1, 6, RT 137, 139; Para. 11 of Plts. Ex. 7, RT 140.

Newsstand Distributorship No. 2 to Mr. James Clifton for $6,000.00 with the consent of McClatchy Newspapers. (RT 1153-56, 1174-76, Plts. Ex. 18). Under this provision city newsstand distributor Scott Berry sold Sacramento Bee City Newsstand Distributorship No. 3 to Howard R. Hoel for $8,000.00 with the consent of McClatchy Newspapers. (RT 1178-82, 1610-19, Plts. Exs. 14, 14A).

However, under the terms of said city newsstand distributor contracts if McClatchy Newspapers terminated the contract, with or without cause, the distributor lost his right to sell his business and forfeited his equity interest and good will in the distributorship. (Plts. Ex. 7, RT 140).

This contractual arrangement whereby a valuable business may be sold as long as you are in good standing with the manufacturer but is forfeited upon termination by the manufacturer gives the manufacturer enormous leverage over the distributor. According to plaintiffs' other expert on newspaper circulation practices, these are the means and tools by which the publisher obtains compliance with its wishes:

> "A. Well, when you're a dealer and you know that your livelihood and your investment in a dealership depends upon what management may or may not do, it has a great deal of effect on what you will do when asked to do so. If you know that you can be terminated by just being given a thirty-day notice without any reason for termination other than the fact that it's in the contract that you can be terminated and something is asked of you, you're reluctant not to want to do it. If you protest it and if someone in management should decide to point out, well, we may need to review your rate or we might need to split your area or, gosh, I don't know if we want to keep on doing business with you, it had a very strong effect." (RT 1281-82).

Witness after witness, subject to this restraint, testified to its effects. City newsstand distributor Gallagher testified that he follows The Sacramento Bee's suggested retail prices, that he stays within the boundaries of his distributorship and that he does not handle any other newspaper than The Sacramento Bee. (RT 1166-67).

City newsstand distributor Hoel testified that he sold The Sacramento Bee at all times at its suggested prices, that he does not handle other newspapers, that he stayed within his territorial boundaries and that at the time he was appointed city newsstand distributor for Newsstand No. 3 he reached an understanding with the circulation department of The Sacramento Bee that he would cease his work as a clerk at Stop & Shop Market, which he did. (RT 1183-84).

City newsstand distributor Clifton testified that since becoming city newsstand distributor in newsstand No. 2 he has not handled other newspapers, that he has sold The Sacramento Bee at the suggested prices and that he has stayed within his territory. (RT 1177).

The other daily newspaper published in Sacramento, The Sacramento Union, has a similar restraint except that in the event of a termination of a Sacra-

mento Union distributor the publisher pays the distributor $1.00 per subscriber. (RT 482-84, 1280). Thus, like The Sacramento Bee, many Sacramento Union distributors in good standing with the publisher have sold their Union distributorships for substantial sums of money with the consent of the publisher. Dewey Jackson, Sacramento Union newsstand distributor in District No. 4 (which was almost the same area as that serviced by plaintiffs for The Sacramento Bee) sold his distributorship for $30,000.00 (RT 1337-49); Bond J. Ward, home delivery dealer in District 700, purchased his Sacramento Union distributorship effective May 1, 1970, from Howard Lathrop for $18,000.00 cash (RT 1404-06); S. William Burchiel, home delivery dealer in District 1700, purchased his Sacramento Union distributorship effective August 1, 1970 from Fred Gardner for $20,000.00 (RT 1414-19, Plts. Ex. 33-A); John E. Smith, home delivery dealer in District 1600, sold a portion of his Sacramento Union distributorship consisting of approximately 1,262 customers to Jack C. Harney effective March 1, 1971 for $20,000.00 (RT 1434-39, Plts. Ex. 41); and Roy Dotson, home delivery dealer in District No. 500, originally purchased his Sacramento Union distributorship effective September 1, 1968 from Wallace Kuhlman for $8,000.00. (RT 1451-53). Notwithstanding the foregoing The Sacramento Union has terminated dealers and paid the terminated dealers $1.00 per customer pursuant to such terminations. (RT 482-83, 592, 1464-65).

The effect of this restraint was brought home by Dick D. Chaney, circulation manager of The Sacra-

mento Union, who testified that none of the city home delivery and newsstand dealers for The Sacramento Union handled other newspapers.

The plaintiffs in this action were Willard M. Noble and his wife, Etta, city newsstand distributors for The Sacramento Bee in the area referred to as Newsstand No. 5 comprising a portion of the counties of Sacramento and Placer in the State of California. They purchased copies of the daily and Sunday editions of The Sacramento Bee newspaper from defendant McClatchy Newspapers and resold from them to retail outlets (such as drug and liquor stores, markets, newsstands and motels) and to purchasers from newspaper vending racks located within said territory. Plaintiffs owned various items of equipment and supplies necessary for the sale and distribution of The Sacramento Bee in said territory, including two trucks, approximately 150 newspaper vending racks, office equipment and related supplies. At the time Willard Noble commenced the distribution of The Sacramento Bee in October 1960 the circulation of The Sacramento Bee in Newsstand No. 5 was 18,000 dailies per month and 3,000 Sundays per month (less returns). In the last month of plaintiffs' distribution of The Sacramento Bee (June 1969) the circulation of The Sacramento Bee in Newsstand No. 5 was 72,000 dailies per month and 14,500 Sundays per month (less returns). (Joint Pre-Trial Statement, CT 343-44).

Defendant Byron Conklin, circulation manager of The Sacramento Bee, testified that Mr. Noble was one of those individuals who got The Sacramento Bee

newspaper in just about the smallest Mama and Papa store (RT 1061-62), that Mr. Noble was recognized as a man with some experience, that he was very circulation conscious (RT 1062), that Mr. Noble worked very hard to service his dealership (RT 1086) and that Mr. Noble "did a hell of a job" for The Sacramento Bee. (RT 1116).

Notwithstanding plaintiffs' outstanding performance as newsstand distributors, defendant Conklin notified plaintiffs by letter dated May 27, 1969 of the termination of their city newsstand distributor contract effective July 1, 1969. The reasons for the termination were hotly disputed at the trial court—forming the basis of a separate claim which is the subject of defendants' petition for certiorari to this Court (No. 76-86).

Defendant Carlo Bua, assistant circulation manager of The Sacramento Bee, testified that a few days after plaintiffs received their termination notice, Mr. Conklin said to him, "Well, Carlo, now is the best time to split Newsstand 5. Let's work on a feasible split that we think would be profitable for those concerned and be equitable to each individual independent contractor for that area" (RT 876-77); that he suggested to Mr. Conklin that he be given the responsibility for making the split which was granted (RT 876); that on June 4, 1969, when Mr. Noble visited their offices he and Mr. Conklin informed Mr. Noble that they were splitting his distributorship (RT 873); and that at the close of the meeting he invited Mr. Noble into his office and showed him the map of the city newsstand

distributorships and the split of his distributorship along Walnut Avenue. (RT 873-84).

Defendant Conklin testified that during his June 4, 1969 meeting with plaintiff Willard Noble, Noble asked him "Why can't I sell Newsstand No. 5" and "I said that his contract had been terminated as of the first of the following month and he had nothing to sell, that we had other plans." (RT 1108) *According to Mr. Conklin the other plans were the splitting of the dealership.* (RT 1108-09).

Effective July 1, 1969 James and Elizabeth Gallagher took over distribution of The Sacramento Bee in half of plaintiffs' former territory and Gary and Judith Downing took over distribution of The Sacramento Bee in the other half of plaintiffs' territory, pursuant to the same form of contract McClatchy Newspapers used with plaintiffs. (Plts. Exs. 10, 12, RT 1097). Approval of the Gallaghers to take over half of plaintiffs' distributorship was conditioned on their selling Sacramento Bee City Newsstand No. 2. (RT 1093-94).

As a result of the foregoing plaintiffs brought an action in the United States District Court for the Northern District of California on June 26, 1969 under Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26 seeking both damages and injunctive relief. (CT 1-16). The case went to trial before a jury on November 16, 1971 upon four separate claims. The third claim, known as the sale of business claim, involved the restraint that is the subject matter of this cross-petition. Plaintiffs claimed that McClatchy

Newspapers' distribution system, whereby plaintiffs had the right to sell their business for a valuable consideration so long as they were in good standing with the publisher but forfeited that right and the equity value of their business upon termination of their distribution agreement, constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, under rule of reason analysis.

The jury returned a verdict in favor of plaintiffs and against all defendants on claim three, the sale of business claim, in the sum of $15,000.00. (CT 793) The jury returned a verdict for defendants on all other claims. Judgment was entered in favor of plaintiffs on the sale of business claim in the amount of $63,333.04—constituting trebled damages in the sum of $45,000.00, attorneys fees in the sum of $13,500.00 and taxable costs in the sum of $4,833.04. (CT 858-59). Plaintiffs' request for equitable relief to permanently enjoin the unreasonable restraint of trade that formed the basis of claim three was denied.

Defendants filed motions to set aside the jury verdict on claim three in favor of plaintiffs and against all defendants, and the judgment entered thereon, and to have a judgment entered in favor of defendants or, in the alternative, for a new trial limited to plaintiffs' third claim. (CT 860-65). On April 10, 1972 the District Court denied without opinion defendants' motions for judgment notwithstanding the verdict and for a new trial. (CT 958-59). On May 5, 1972, defendants filed a notice of appeal. (CT 962-64). On

May 15, 1972, plaintiffs filed a notice of cross-appeal. (CT 973-74).

The $63,333.04 judgment rendered by the District Court in plaintiffs' favor on claim three, the sale of business claim, was reversed by the Court of Appeals on the sole ground that plaintiffs suffered no damages as a result of the imposition of the unreasonable restraint of trade. The Court of Appeals directed the District Court to enter judgment n.o.v. in favor of defendants and against plaintiffs on the sale of business claim.

Plaintiffs filed a timely petition for rehearing with the Court of Appeals directed solely to that court's reversal of the sale of business claim. This petition was denied on May 20, 1976.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with applicable Supreme Court decisions, weakens the effectiveness of the private action pursuant to Section 4 of the Clayton Act as a vital means for enforcing the antitrust policy of the United States and adversely affects tens of thousands of dealers and franchisees throughout the United States, who are subject to this same form of restraint.

Claim three, the sale of business claim, alleges a violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Since the case of *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, Section 1 has been con-

strued as precluding only those contracts or combinations which "unreasonably" restrain competition. While there are certain agreements or practices, such as price fixing, division of markets and tying arrangements, which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable, and therefore illegal *per se, Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 5, plaintiffs do not contend that claim three alleges a *per se* violation. Rather, the restraint that is the subject of claim three requires the application of the "rule of reason" test. The District Court's instructions on claim three so provided. 533 F.2d, at 1084, fn. 7.

In *Chicago Board of Trade v. United States,* 246 U.S. 231, 238-39, this Court set forth the criteria for determining whether a particular agreement or regulation constituted an "unreasonable" restraint of trade:

> "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The rule of reason inquiry is "primarily a factual one", *Alpha Distributing Co. v. Jack Daniel Distillery,* 454 F.2d 442, 452 (9th Cir.), and pursuant thereto plaintiffs introduced at trial over the course of 5 weeks extensive proof of the history of the sale of business restraint, the implementation of the restraint, the use of the restraint by other newspapers including The Sacramento Bee's only competitor, the effect of the restraint on interstate trade and commerce, other trade restraints which were ancillary to and accompanied this restraint, the purpose of the independent contractor system of distribution, the market position of The Sacramento Bee and the disparity in the bargaining power of the parties. The verdict of the jury in favor of plaintiffs on this claim and the denial by the District Court of defendants' motion that the evidence did not support the verdict clearly establishes that plaintiffs sustained their burden of proof that the subject restraint was an unreasonable restraint of trade.

Indeed, the Court of Appeals did not hold otherwise. Like the sales commission system for marketing TBA, which the Court found in *Federal Trade*

Comm'n v. Texaco, Inc., 393 U.S. 223, 229 to be "inherently coercive" and adversely affecting competition in the marketing of TBA, the instant restraint is far more coercive on the distributor and franchisee than the sales commission system condemned in *Texaco*. As a result the restraint herein is far more effective in causing distributors and franchisees to adhere to suggested resale prices, suggested products to handle and not handle, and suggested territories to serve and not serve. It is plain common sense that a small businessman, knowing that as long as he is in good standing with his supplier he can sell his business for its going concern value, but will forfeit that right if he is terminated, with or without cause, will comply with his supplier's wishes on such vital matters as price, product and territory.

The sole ground for the reversal of the judgment of the District Court by the Court of Appeals was that this unreasonable restraint in trade did not cause plaintiffs any damage. The Court of Appeals viewed the injury caused by the violation as the loss to plaintiffs of the right to sell the distribution rights to the Bee for thirty-odd days, whereas the jury found (and upheld by the District Court) that the damages were the going concern value of plaintiffs' distributorship. The Court of Appeals thus measured the damages in terms of the value of plaintiffs' business *after* imposition of the illegal restraint—the refusal of McClatchy Newspapers to allow plaintiffs to sell their business as a going concern to an acceptable purchaser.

In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theatre granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages, stating:

> "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act on probable and inferential as well as direct and positive proof.' *Story Parchment Co. v. Paterson Parchment Paper Co., supra* 282 U.S. 561-564; *Eastman Kodak Co. v. Southern Photo Material Co., supra,* 273 U.S. 377-379. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U.S., at 264-265.

Here, plaintiffs followed the same method of proof as in *Bigelow*—introducing evidence of the sale price and financial operating figures of *comparable* Sacramento Bee and Sacramento Union dealerships which had been sold in arm's length transactions and which

had *not* been damaged by the restraint. The trial court's instructions to the jury on the fact of damage and damages followed the teachings of *Bigelow*. RT 2343-2345. After trial the District Court then reviewed the evidence and denied defendants' motion for judgment n.o.v.

The decision of the Court of Appeals directing the entry of a judgment n.o.v. for defendants based upon its own finding that plaintiffs suffered no damages from the violation, is contrary to the reviewing functions of an appellate court as well as the teachings of *Bigelow* and other cases dealing with the standard of proof in treble-damage actions—"their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 122-125; *Story Parchment Co. v. Paterson Parchment Paper Co., supra* at 566-67.

The policy basis of the Court of Appeals' decision denying plaintiffs damages on the sale of business claim was:

> "Allowing plaintiffs in the present case to recover antitrust damages on the sale-of-business claim after losing the termination claim would in effect reverse the well settled law on the antitrust implications of distributorship terminations. Allowing plaintiffs to recover on the sale-of-business claim after winning on the termination claim would be to permit duplicative recovery." 533 F.2d, at 1085, fn. 9.

There is no basis for the Court of Appeals' concern that duplicative recovery may occur. The District Court specifically instructed the jury:

> "In determining damages, you are not to concern yourself with whether or not the damages from each claim are cumulative or not. The Court will insure that there will be no overlapping recoveries. Your function is in respect to each claim of the plaintiffs upon which you find liability by the defendants and injury to the plaintiffs to determine plaintiffs' actual damages." RT 2345.

To deny plaintiffs the right to challenge a trade restraint as pernicious and anticompetitive as that contained in the sale of business claim, because there are no damages if the termination is lawful, is to tie the sale of business claim to the termination claim. But the jury was specifically "instructed to consider the sale-of-business claim separate and apart from the termination, and 'irrespective of whether or not the termination of the contract was lawful,'" 533 F.2d, at 1085, an instruction apparently meeting with the Court of Appeals' approval. *Id.*, at fn. 8.

Under the Court of Appeals' rationale there is no conceivable way that plaintiffs could challenge the sale-of-business restraint. While they are dealers in good standing they have not suffered any damages from the restraint since they are free to sell their businesses. If they have been terminated lawfully but denied the right to sell their business as a going concern there are no damages according to the Court of Appeals' decision in this case. And if they have been terminated unlawfully and denied the right to sell their business plaintiffs can recover under the termination claim. The effect of the Court of Appeals' decision is to eviscerate section 4 of the Clayton Act as

a vital and necessary means for enforcing the antitrust policy of the United States. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 136. The effectiveness of the section 4 treble-damage suit would be to a great extent nullified if a seller is able to inherently coerce buyers into a combination whereby prices are fixed, dealing is required to be exclusive and areas and customers are confined through the sword of denial of the right to sell one's business by one who is not in good standing with the seller. This was clearly demonstrated in this case where plaintiffs were not permitted to sell their distributorship but the Gallaghers, who could *not* own and operate two newsstand distributorships according to McClatchy Newspapers' policy, were allowed to sell Newsstand No. 2 for $6,000 pursuant to their acquiring half of plaintiffs' distributorship.

The effect of the decision of the Court of Appeals was not only to expose McClatchy Newspapers' city newsstand distributors to cancellation and denial of the right to sell their businesses but, also, tens of thousands of other franchisees and dealers under similar restraints were also exposed. In fact, the effect of the Court of Appeals' decision was clearly evidenced 45 days after its decision was handed down.

On December 29, 1975 McClatchy Newspapers notified all of its city newsstand distributors except one of the termination of their contracts effective March 1, 1976. McClatchy Newspapers refused to permit these distributors to sell their businesses and denied any obligation to compensate them for their businesses

even though several had paid substantial sums of money for their businesses with McClatchy Newspapers' consent. One terminated city newsstand distributor (John and Gloria Naify) paid $37,500 for their newsstand distributorship with the consent of McClatchy Newspapers. These facts are all set forth in an antitrust suit filed by 7 of the city newsstand distributors against McClatchy Newspapers on January 26, 1976. Civil No. C-76-117 in United States District Court for the Northern District of California.[7] McClatchy Newspapers' action, 45 days after the Court of Appeals' decision in this case was rendered, had the effect of wiping out 9 small businesses having a total market value, prior to said action, in excess of $400,000.

The Court of Appeals' decision in this case will have a substantial and adverse effect on the approximately 374,694 franchised establishments in the United States. These franchisee-owned businesses will do an estimated $163 billion worth of sales in 1976. The average franchisee will do an estimated $435,000 worth of sales in 1976. The total investment and start up cash required for these franchisees in 1974 varied from $26,000 for a rental service equipment franchisee to $850,000 for a motel franchisee. These franchised establishments are controlled by a relatively small number of franchisors—less than 1500.[8] The invest-

---

[7]Judicial notice may be taken of the records of this Court. Cal. Evid. Code §452(d).

[8]Franchising in the Economy 1974-1976, United States Department of Commerce/Domestic and International Business Administration/Bureau of Domestic Commerce.

ments of tens of thousands of these franchisees are jeopardized if the franchisor can wield a two edged sword which permits the franchisee to realize his investment in his business so long as he is in good standing with the franchisor but forfeits that investment by not being allowed to sell his business if he is terminated—whatever the reason. This anticompetitive abuse is real[9] and should be dealt with now before too many more small American businessmen suffer the fate of the Nobles and the other Sacramento Bee city newsstand distributors. Confiscation of a man's estimated $163 billion worth of sales in 1976. The averit is used to unreasonably restrain interstate trade and commerce.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

G. JOSEPH BERTAIN, JR.,

TIMOTHY H. FINE,

Attorneys for Cross-Petitioners.

Dated, August 16, 1976.

---

[9]FTC STAFF REPORT OF AD HOC COMMITTEE ON FRANCHISING, submitted to the Federal Trade Commission, June 2, 1964, p. xi (Conclusions Proposed by Mr. Rufus E. Wilson, Chief, Bureau Restraint of Trade).

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-242

WILLARD M. NOBLE and ETTA M. NOBLE,
Petitioners,

vs.

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY, an individual; WALTER P. JONES, an individual; C. K. McCLATCHY, an individual; BYRON CONKLIN, an individual; CARLO BUA, an individual,
Respondents.

Respondents' Brief Re Petition for Writ of Certiorari

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
111 Sutter Street
San Francisco, California 94104
Telephone: (415) 434-0900
Attorneys for Respondents

Of Counsel:
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, California 94104
Telephone: (415) 434-0900

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-242

WILLARD M. NOBLE and ETTA M. NOBLE,
Petitioners,

vs.

McCLATCHY NEWSPAPERS, a corporation;
ELEANOR McCLATCHY, an individual;
WALTER P. JONES, an individual; C. K. McCLATCHY,
an individual; BYRON CONKLIN, an individual;
CARLO BUA, an individual,
Respondents.

Respondents' Brief Re Petition for Writ of Certiorari

Petitioners seek a writ of certiorari to review the identical judgment of which McClatchy Newspapers,[1] the respondent here, seeks review as petitioner in No. 76-86.

Petitioners here seek review of additional questions, but those questions relate to the supposed facts of a particular case and, unlike the questions stated in the petition in No. 76-86, present no matters of general importance.

---

1. And its officers and employees Eleanor McClatchy, C.K. McClatchy, Byron Conklin and Carlo Bua.

The claim which the petitioners here discuss was recognized by the court below to be a bit of verbalistic juggling. The petition dwells on an alleged "denial of a right to sell a business," but the "business" rested entirely upon a contract with McClatchy terminable by its express provisions on thirty-days' notice by either party. McClatchy did not "deny" Noble a "right to sell a business;" all it did was to exercise its contractual right to terminate the contract. With the contract terminated, there was simply no "businsss" which Noble possessed to sell or which anyone would buy.

Another of the claims presented by Noble was that McClatchy's termination of the contract violated the antitrust laws, and that issue is involved in the petition in No. 76-86. The court below recognized that the controversy centered on that claim. As the court said, if the termination did not violate the antitrust laws, there was no business to sell and therefore no damages from any inability to sell a business, but, on the other hand, if the termination did violate the antitrust laws, Noble's recovery rested there, and to permit recovery under the rubric of "denial of a right to sell a business" would be merely duplicative.

The discussion of the petition is wholly at sea in irrelevancy. Largely it argues about the role of a jury in a "rule of reason" antitrust case. But as pointed out in the petition in No. 76-86, the court below held that the termination claim had to be determined upon a *per se* basis.

CONCLUSION

We agree that the judgment of the court below should be reviewed, but we respectfully submit that the writ should be limited to questions presented in the petition in No. 76-86, and that it should not encompass the questions sought to be presented in the instant petition.

Dated: San Francisco, California,
August 31, 1976.

Respectfully submitted

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
111 Sutter Street
San Francisco, California 94104
Telephone: (415) 434-0900